

A SYMPOSIUM ON THE JURISPRUDENTIAL BASIS OF THE LAW OF STRICT LIABILITY

A Critical Evaluation of Case Materials

The following is a transcript from recordings made at the annual round table meeting on jurisprudence of the Association of American Law Schools, at its annual meeting, held on Saturday, December 29, 1956, at the Edgewater Beach Hotel, Chicago, Illinois. This program was a pioneer effort to demonstrate a new method of conducting round tables at conventions of jurists. It is in contrast with the usual method of formally reading papers followed by a sporadic question period. It is based on the premises that jurists who attend conventions should do so for the purpose of "rubbing mind on mind", rather than listening to papers which could be read after publication. (Editorial comment by Dr. Brown, chairman of the Round Table.)

ASSOCIATION OF AMERICAN LAW SCHOOLS ROUND TABLE MEETING ON JURISPRUDENCE

DR. BRENDAN F. BROWN, Loyola University of New Orleans,
Chairman

The Jurisprudence Round Table Meeting for 1956 will please come to order. Our Council will undertake to present a new type of program this afternoon. Three speakers will present papers of about ten minutes in length on the subject of the *Jurisprudential Basis of the Law of Strict Liability, A Critical Evaluation of Case Materials*.

Six cases will principally be considered, namely:

1. *Vincent v. Stinehour*, 7 Vt. 62, 29 Am. Dec. 145 (1835)
(or any other "horse and buggy" traffic case.)
2. *Vincent v. Lake Erie Transportation Co.*, 109 Minn. 456, 124 N.W. 221 (1910).
3. Any modern traffic accident case.
4. *Luthringer v. Moore*, 31 Cal. 2d. 489, 190 P. 2d 1 (1948) (or any other extrahazardous activity case).
5. *Sorenson v. Wood*, 123 Neb. 348, 243 N.W. 82 (1932)
(or any other defamation action against a large scale publisher involving statements of political or other public concern).

6. *Madsen v. East Jordan Irrigation Company*, 101 Utah 552, 125 P. 2d 794 (1942).

After the presentation of the formal papers, I shall endeavor to lead the group after the manner of a great books discussion which will be spontaneous and unrehearsed. Questions and comments will be expected from the audience after the completion of the discussion. The proceedings will be transcribed and, if possible, published.

The first paper will be presented by Professor Fleming James Jr., of the Law School of Yale University*.

Professor James:

My approach to tort problems has not been primarily a philosophical one. Yet it has been concerned with much beyond the concepts and rules of tort law itself. It has often been preoccupied with the practical implications of tort law for the social and economic problems of current life.

In dealing with such problems one must, of course, have a standard of values for assaying the problems themselves and the merits of possible solutions to them, and these values in turn must rest on some sort of justification. I have pretty much accepted values which have wide current recognition, and sought to employ them along pragmatic and utilitarian lines. This has not, however, meant a ruling out of moral considerations. Widely held feelings of what is fair or just must necessarily play a most important part in the solution of legal problems, whether the matter be viewed in terms of of men and only imperfectly reflected in them.

More concretely, things which I accept as good include: (1) the dignity of the individual; (2) the physical well-being of the individual; (3) a wide freedom of speech, especially about matters that concern the public; (4) the possession or receipt of property or money; (5) the engaging in lawful activities for the production of goods or services, or entertainment; (6) the continuing development of the arts and sciences to advance such production; and (7) satisfying the prevailing community sense of justice or fairness.

*Professor James' material is reprinted here by special permission of Louisiana Law Review (18 La. L. Rev. 293).

The opposites of these things are bad.

These values are here vastly oversimplified. In other contexts, they would need great qualification. At least some of them might not stand up at all. But in the present context they will serve as a useful point of departure for analysis, though the attempt to apply and balance them in the varying situations dealt with by tort law will yield no easy or automatic answer.

Let us start with the unintended and undesired injury caused by D while he is in the course of pursuing a lawful activity—with what is generally called accidental injury. The loss caused to P is bad, but it has already happened. If D must pay, this merely shifts the evil from P to D and society gains nothing from that shifting (although something might be said for a sharing of the loss by the participants). Moreover D has gained nothing from the accident and his conduct, if it was not negligent, carried no unreasonable threat of causing an accident. Current notions of fairness would be offended by making innocent D pay damages under the circumstances described. Further, liability would tend somewhat to discourage his activity (which, by hypothesis, is good). That deterrence, however, is not an unmixed evil—if it is not too great it might not keep D from carrying on his activity but simply make him more careful in the prosecution of it.

Balancing all these considerations, the rational rule may well be to exonerate D unless the manner in which he was carrying out his legitimate activity was unreasonably dangerous. This is the rule of negligence and makes sense as applied to matters between neighbors.

The *Vincent v. Lake Erie Transportation Co.* case calls into play some different considerations. Here, too, P has been hurt by D's lawful conduct. But D did save his own much more valuable property by a deliberate choice of action which entailed damage to P as a foreseen and inevitable consequence. To shift P's loss to D under such circumstances serves some good because the very conduct which caused P's loss has preserved to D more valuable property out of which to pay that loss. From a purely utilitarian point of view,

the net ill effects of the loss will therefore be reduced by this shifting. If the parties started with equal means, the marginal utility of the sum representing P's loss is not greater to P than to D. Moreover, shifting the loss will not inhibit desirable conduct on D's part. From society's point of view, D's conduct in deliberately causing a loss is justifiable only because it prevents a greater loss or produces a gain. The greater the disparity between the saving (or gain) and the loss, the greater the justification. The greater this disparity, the less will D be deterred from making the saving (or gain) by fear or liability for the loss. It is only where the saving (or gain) approximates the loss, that such liability will deter the choice to make the saving; and in such cases society has little motive to encourage the conduct which inflicts the loss.

Quite aside from these considerations from expediency, the prevailing climate of moral opinion will accept the notion of making D—though innocent of fault—pay for a loss he deliberately caused another either to make a gain for himself or to save himself from greater loss. This is attested by the universality of provisions for compensation where eminent domain is exercised to produce a public gain by inflicting loss on an individual.

Where D's conduct is not to preserve his own interest primarily, but interests of third persons, this basis of liability on D's part may fail. There may be a reason for distributing P's loss among the beneficiaries, but this will depend on many factors, such as the authority of D thus to act on their behalf.

We come now to the case of the modern accident. This is a far cry from the typical accident of a century ago. It is no longer a matter between neighbors wherein the loss must be borne by one or the other of them. It is usually the by-product of commercial or industrial enterprise, or of motoring. These facts characterize the typical modern accident; the victims as a group fall in the lowest income brackets and are therefore least able to bear the economic loss involved. Those who are held for these accidents (under modern systems of liability and proposed extensions of them) have the means for combining and distributing these losses widely among the beneficiaries of the enterprise. Moreover, these potential defendants have chosen to engage in their activity

in the face of statistical certainty that it will take a toll of life and limb. Recent studies show that accidents are not usually caused by morally blameworthy conduct on the part of the people actually involved on the scene. Accident liability is not generally borne by the personal participants, but by absentee defendants, like employers or insurers. Civil liability—even strict liability under Workmen's Compensation—has not discouraged useful enterprise but has acted as a spur to accident prevention by the parties best placed to promote it.

Under these circumstances—if you look at the real incidence of liability and not the nominal defendant in litigation—the reasons for liability without fault in the *Vincent* case apply to the modern accident. The loss is shifted to those who are benefiting from the enterprise which more or less inevitably took the toll. In addition, the loss is widely distributed, and its ill effects thereby minimized by an even further application of the economic law of marginal utility. Moreover the risk of loss is thus made certain and calculable.

Morality and a sense of fairness might well be offended if the loss were shifted to the individual defendant who was the innocent instrument for causing it. The matter stands differently where the loss is distributed among the beneficiaries of the enterprise that had to inflict losses to gain the benefits.

Perhaps I should mention here what seems to me to be a necessary rational corollary to strict liability in accident cases. The argument for meeting the human needs of accident victims and distributing their loss among the beneficiaries of the enterprises that cause them is not an argument for full compensation to these victims as we think of compensation in tort cases today. It calls for damages or awards which will provide for care, cure and rehabilitation; for the preservation of homes and the necessary maintenance of dependents during periods of incapacity; for the reparation of economic loss. But allowance for intangible items like pain and suffering (natural enough where compensation is made by a wrongdoer) may well be out of place where the bill is being footed by innocent persons.

This line of reasoning would, I submit, warrant strict liability generally for accidents caused by enterprises on activities wherein risks are now combined, or feasibly could be and would be combined in response to pressure. The same reasoning would, *a fortiori*, justify imposing strict liability on *extra-hazardous* activities, as was done in the *Luthringer* and *Chapman*¹ cases.

Some of the same considerations apply to *Peck v. Chicago Tribune*² and *Sorenson v. Wood* but not all. And here I think countervailing considerations out-weigh them at least in that part of defamation which lies within the field of debate and discussion of issues of legitimate public interest. What will be deterred here if liability is strict, will not be the enterprise as a whole but the publishing of potentially defamatory matter. And this would lead the owners of our modern channels of communication to restrict their use in public debate. This, it seems to me, would be too high a price to pay for the additional protection given to private reputations by strict liability here. Moreover the injury is of a different type and one for which money damages is not nearly so appropriate a remedy.

(Prof. Brown:) The next paper will be presented by Prof. Harry Kalven Jr. of the Law School of the University of Chicago. Professor Kalven:

I start with some uneasiness as to the scope of the enquiry we are embarking on this afternoon. The title, "The Jurisprudential Basis of Strict Liability", leans in the direction of an invitation to discuss one's basic views of the proper foundations of tort liability. The added specification that we build our comments around particular cases seems to me to lean away from anything quite so general and more in the direction of an invitation to discuss specific problems in the application of strict liability notions today. Accordingly, I shall resolve this ambiguity by trying alternately to lean in each direction. In any event, I am sure I speak for my torts colleagues in thanking Dr. Brown for the very considerable compliment involved in treating a torts issue as within the domain of jurisprudence.

¹ *Chapman Chemical Co. v. Taylor*, 215 Ark. 630, 222 S.W.2d 820 (1949).

² *Peck v. Tribune Co.*, 214 U.S. 185 (1909).

Insofar as jurisprudence is concerned with the most general concepts of specific fields of law, strict liability does indeed have a legitimate claim to attention. It is, of course, one of the architectonic notions of tort law. It is the base line from which thinking about tort proceeds. The most intelligible view of negligence surely is that it is a limitation on liability—a limitation, that is on strict liability rather than an extension of liability beyond intentional wrongs. It is largely in its departures from the simplicity of strict liability that the refinements and superstructure of tort law have been built. Or, to put this with a more vocational emphasis, if the legal system had adhered to strict liability, tort teachers would have a great deal less to teach and talk about. This, then, is my first point—simply that strict liability is an indispensable reference in any discussion of tort.

Closely related are three other observations, equally familiar. First, strict liability is at once the most primitive and the most sophisticated basis for liability. For some time now the large design of torts teaching has been the tracing of what my friend, Charles Gregory, has called the shift from trespass to negligence to absolute liability. When strict liability is based on nothing more elaborate than the point that the man who caused the harm should pay for it, it is, I think, a primitive idea congenial to a system not yet concerned with the qualifying circumstances under which one man can cause harm to another. And we are all familiar with the point that nothing is accomplished by having the legal system simply shift a misfortune from the victim to the actor. My second observation is that negligence arises as a form of doing equity. Whatever the merits of real *politik* interpretations of negligence as a sop to the industrial revolution, it is also an effort to discriminate among the cases in which harm has been caused and to refine the crude notion that a man always acts at his peril. My third observation is that strict liability can be restated with great force and sophistication, as we have learned from Professor James, but only in a context that includes insurance or some other device for a wide distribution of risk and loss. When this is done, the very meaning of the term "liability" changes considerably. The issue is not whether the actor or the victim should pay for the accident, but whether compensation for accidents cannot

in some way be "socialized." The actor is to be made liable not because of his individual contribution to the accident but because he is thought to be an appropriate conduit for a wide distribution of the loss. We thus begin with a question of justice between two individuals and end with a question of loss administration between large groups. Let me attempt to say this another way—in terms of the contemporary debate utilized to spread loss was some form of accident insurance or that in one economic view it is the workman in the end who pays for Workmen's Compensation. Thus, in its modern guise, strict liability may not really put into issue notions of fault. Rather it redefines matters so as to make fault irrelevant. The perspective is therefore closer to that of taxation, and under pressures of contemporary thinking about strict liability, tort law is always on the brink of becoming a branch of public law.

The merits of strict liability in modern form is a complex question that I will not explore at this point. My principal point is that strict liability in its old form is a central notion against which negligence must be held to be intelligible; and that strict liability in its new form raises real but quite different issues of basic policy—issues best discussed in a broad context of social insurance and taxation.

So much then for general ruminations; I will now lean a little toward the cases. Again I have three points, only loosely related. First, putting to one side major legislative overhauling of tort law, can strict liability and negligence live peacefully together? Can they share jurisdiction over accidentally caused harms? Or, as Jeremiah Smith thundered forty years ago, are they irreducibly inconsistent with each other? *Luthringer v. Moore* is an instance in point. How does a court go about deciding whether the activity in question—exterminating—calls for application of the one principle or the other? As we know, the California court fell back upon Sec. 519 of the Restatement³ and found the activity

³ RESTATEMENT, TORTS § 519 Misconduct of Ultrahazardous Activities Carefully Carried On. Except as stated in §§ 521-4, one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable misconduct of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.

ultra-hazardous and not within the common usage exception. I admire the Restatement's effort as a *tour de force* to unify the islands of strict liability never engulfed by negligence. If, however, we read it as saying there are some cases where strict liability is appropriate and other situations where it is not, difficulties abound: (a) It seems to me that all activity is ultra-hazardous in the Restatement's sense; all activity carries a margin of unpreventable miscarriage. (b) If liability seriously depends on the incidence of unpreventable harm, how can this criterion be tested in litigation? What must a defendant show to establish that his activity isn't that dangerous? How would one compare statistically the incidence of unpreventable harm in operating a tractor, an automobile, an oil well, a railroad, or a Coca-Cola plant? (c) When does an activity come within the common usage exception? How many millions of miles of airplane travel must occur annually before the airplane qualifies?

Thus, I would suggest that the criterion is unworkable. And there is a further difficulty. Assume for the moment that we have successfully identified exterminating as ultra-hazardous. Why does this justify placing the burden upon it of compensating for unpreventable miscarriages? The harm is not intentional and the activity is, on hypothesis, socially useful. Why then is it not entitled to the same "privilege" for non-negligently caused harm as are other activities?

In repeating these well-worn queries, I have attempted to keep loss-shifting criteria out of the discussion. Of course, Sec. 519 can be justified as a half-way house to an overall system of absolute liability; and on that view it can never be an error to classify an activity as ultra-hazardous. My question is the doctrinally pure one, such considerations apart, of whether there is a limited category of activities for which strict liability is appropriate and another category for which it is not. As a footnote, I would add that if Sec. 519 is to be read as implicitly embodying criteria of superior risk bearing, it is not apparent that more dangerous activities carry with them greater capacity to distribute risks.

I turn now to another familiar doctrinal difficulty with strict liability. How strict is it? Once we are committed to it for a given type of conduct, what consequences remain

beyond its scope? Here *Madsen v. East Jordan Irrigation Co.* is illustrative. Perhaps the conduct of the mother mink was not as idiosyncratic as the Utah court assumed, but the case makes its point: absolute liability is not unlimited liability. And if it is not, there is not only the difficulty of where and when to limit it, but also the difficulty of distinguishing it from other forms of limited liability, such as liability for negligence.

My last point is illustrated sufficiently by a case such as *Peck v. Tribune*. It goes to the reach of the strict liability principle across the field of tort. Why has it traditionally been found in defamation? With all deference to Justice Holmes' explanation in the *Peck* case, surely it is difficult to regard communication as an ultra-hazardous activity carrying a threat of serious harm, to say nothing of the common usage exception. And there is the additional incongruity of finding strict liability in an area where law generally is inhibited by the Anglo-American commitment to the freedom of speech and freedom of press. Nor, if we jump ahead again to risk distribution notions, does defamation appear to me to offer a particularly good occasion for the application of such criteria. Would not, for example, a proposal to license publishers only on the condition that they carry libel insurance raise serious policy misgivings?

Behind such queries is the old question, appropriate at least for jurisprudence auspices, of whether, seventy-five years after Holmes' *Common Law*, tort doctrine is not still a haphazard collection of historical accidents with no unifying theory. In any event, the flavor of strict liability in defamation is different and suggestive of a few final observations, both as to the possible reasons for strict liability here and as to the system's elaboration of it. The most attractive explanation for the defamation rule is that since contributory negligence could play little or no role in defamation and since the use of words is a deliberate readily controlled activity, most instances of defamation do, in fact, involve at least negligence. Hence the role of strict liability is simply to avoid the complicating of the law that would result from the effort to isolate the very occasional case of non-negligent defamation. On this view the introduction of a negligence limitation would be a too expensive indulgence in equity. This,

then, would be sort of a penumbra theory of strict liability; and it serves at least to indicate how versatile the rationalizations for strict liability may be.

My final observation is somewhat at war with this rationale. It simply calls attention to how different the structure of the law of defamation is from that of negligence. The route to equity has been by way of an elaborate set of privileges—privileges so extensive that it is doubtful whether strict liability is in the end the rule or the exception in defamation. One can at least briefly wonder what the law of negligence would have looked like had it followed the same line of development.

Perhaps I have been less explicit than I should about the relevance of values to evaluation of a concept such as strict liability. I will add at least this. The justifications and meanings of so general an idea vary with its context. Hence, strict liability calls into play a variety of possible values. The values may be the values of simplicity in a rule of law that we act at our peril as against the quixotic equities of limiting liability to negligence. They may be in the special simplicity of the penumbra theory of liability suggested for defamation. They may be in the justice of measuring liability by the incidence of unpreventable harms. They may be in the subtle unjust enrichment found in the *Lake Erie* case. Or the values may be those of socializing accident losses and other misfortunes through some compulsory use of the insurance principle and may lead to such extra-tort issues as compulsory thrift, the scope of state activity, the marginal utility of money, justice in taxation, and even the problem of poverty.

I end then much where I began. Strict liability is a key concept in tort law, the tracing of which immediately brings to the fore the principal policy issues in tort law and the principal gaps in tort theory. I am aware that in this brief comment I have done little more than raise a few familiar questions in the hope of shifting the risks of seriously discussing them to others on this round table.

(Professor Brown:) The third, and final, paper will be presented by Dean Joseph T. Tinnelly of St. John's University School of Law.

I think that a prefatory word might be in order. I am certainly not competent at all in the field of torts and am afraid that Dr. Brown may have confused interest with competence in the field of jurisprudence, but in the hope of at least stirring up some discussion later, I'll venture to say a few words on the subject.

It is evident that the doctrine of strict liability is frequently inseparable from the quest for financially responsible defendants. The *Sorenson* case illustrates this point very clearly. As you will recall, in the *Sorenson* case, the defendant radio station, which had broadcast a political speech, was required by the Federal Communications Commission to give equal time to the opponents. During the course of the opponent's speech, he uttered some libelous remarks. In an action for libel, the defendant radio station was held liable for defamatory statements uttered by this political speaker and this broadcast over the company's station, notwithstanding the fact that the statutory provisions prohibited censorship of the material, so that it had to broadcast it and it could not censor it. This seems, therefore, a perfect case of a search for a financially responsible defendant.

If the person uttering the libel had been a millionaire, it is questionable if the plaintiff's attorney would have pressed the issue of whether the broadcasting company was liable for a speech which the Federal Communications Commission had directed it to broadcast and which it was not permitted to censor.

This search for a financially responsible defendant has been a potent factor in the development of the reasoning which underlies Workmen's Compensation. Yet this search has not been pursued so ruthlessly as to fix liability on a defendant solely because of his ability or greater ability to bear the costs. Otherwise the search for a defendant would hinge upon an accounting, and the more affluent of possible defendants would be burdened with the liability. Obviously the American sense of justice and fairness would be outraged by such a proposal. In fact, the doctrine of the *Sorenson* case has already been limited or rejected in a number of states by legislation or decisional law.

Yesterday, in his invocation, Cardinal Stritch prayed that God might deliver us from the errors of the pragmatists or from the errors of the positivists. Fortunately, most pragmatists and positivists of my acquaintance are better than their philosophies, and some of them, in fact, are themselves excellent proof of the reality of natural law since they accept and practice absolute principles of justice which they might reject or ignore in theory.

On the other hand, Cardinal Stritch emphasized the errors of the pragmatists and positivists. He did not, nor would he, deny that there are vast areas of the law in which the reason for adopting an ordinance or a statute must be more or less pragmatic. The most orthodox or even the most extreme advocate of a natural law philosophy would not contend that there is, or can be, an objective, perfect traffic code, for instance, or motor vehicle act which should be adopted in all parts of the world without change. The natural law principle which requires one to exercise his rights or use his property so as not to injure the rights or property of another leads to the necessity for some sort of a traffic law. But the details of the law are the province of the practical man, guided, but not coerced, by the natural law. Take, for example, the English rule of keeping to the left side of the road. I am told that the low-hanging branches on either side of the early English turnpikes made it necessary for stagecoach drivers to direct the coaches so that their whips would not become entangled in the branches; and since most of the drivers were right-handed in swinging the whips, the coaches tended to travel on the left side of the road, and the custom of passing on the left finally became firmly fixed.

There is no absolute rule of natural law which prescribes the side of the road on which traffic must pass. This is an area in which practical and pragmatic considerations are important. On the other hand, the natural law is not completely excluded. It would be a violation of the natural law for a group of the members of Parliament with substantial investments in Ford or General Motors to bring about a change in the traffic law which would require the present automobiles to be replaced with left-hand drive models if

the primary motive of the change was the self-enrichment of individual M. P.'s.

So, in a matter of strict liability, there is ample room and serious need for practical and pragmatic considerations. The natural and moral law can be of help in many ways, but the area of strict liability seems to be one in which there is special need for experiment and experience.

The civil law is limited by the natural law in that it cannot command what the natural law forbids nor forbid what the natural law commands. The role of the civil law is at least threefold:

- 1) To interpret what the natural law commands or forbids, or to supplement it by appropriate procedures, or to apply sanctions, such as the child welfare laws.

- 2) To determine what the natural law leaves undetermined; for instance, how shall the decedent's obligations to the dependents be fulfilled if he dies intestate.

- 3) To impose obligations for the general welfare which are in accord with the natural law; for instance, prescriptive rights, the validity of contracts by minors, property rights of spouses, such as community property, etc.

The civil law cannot bind in conscience unless it conforms to the prescriptions of the natural law, e.g., to bind in conscience, the law must, among other things:

- 1) Be not opposed to Divine or natural law.

- 2) Have for its ends the common good. And yet it must recognize the rights of property of individuals so that a resultant profit for many is not sufficient reason for taking the property of an individual except under certain conditions of police powers.

- 3) Pertain to matters within the jurisdiction of the legislator.

- 4) Distribute honors and burdens or rewards and punishments proportionately and fairly.

The history of the development of the law of torts in Anglo-American law, running the gamut from the trespass on the case to negligence to strict liability, may well have been reflecting, even unconsciously, some of the precepts of the natural law which impose obligations of restitution in some cases without reference to the civil law. While in others it imposes no obligation in conscience until after a burden has been imposed or determined by the civil law. An employer who has taken every precaution to protect his employee from injury on the job is not bound in conscience by the virtue of justice to compensate that employee for injuries sustained during the course of his employment where there was no negligence whatsoever. Yet, the natural law recognizes the jurisdiction of the civil law to impose such an obligation upon the employer; and once it has been imposed by the civil law, that obligation will oblige in conscience.

The civil law has jurisdiction to regulate and even to forbid certain occupations which are so inherently dangerous as to constitute a threat to the rights of others, no matter how carefully the agent may perform those acts. The civil law may also impose the burden of carrying insurance against harm from such acts even though there is no fault in the moral, but only in the legal, sense. Thus, compulsory automobile insurance can be justified not only as a means of distributing the risk but also of imposing the liability or responsibility which the natural law does not impose, but leaves to the discretion of the civil legislator.

It seems clear, however, that not all civil laws are justifiable uses of the power of regulation which is inherent in civil government. The *Sorenson* case, (the broadcast of a libel), seems unfair inasmuch as it shifts the risk to one who cannot avoid either the act or the method of acting without serious consequences. It seems that the extra-hazardous concept of the *Restatement* is a justifiable method, but not necessarily the best method of producing the effect.

If all of this seems inconclusive, it is due in great part to the nature of the problem. It is difficult to say how many

million miles we must fly airplanes before taking them out of the extra-hazardous, unusual or uncommon category. But the line must probably be drawn sometime, and fairness would suggest that it be done by legislation rather than by the courts. Yet, no legislation is going to be able to foresee the myriad possibilities, such as arose in the *mink case*.⁴ Therefore, perfection and completeness in this series can never be obtained and should not be expected.

There is just one final word I would like to say inasmuch as we are partaking in a law school convention—a word on education. I believe that a course in equity should be a part of every curriculum—not a course on the development of the growth and decline of an historical court, but a course in the methods by which intelligent and experienced judges have attempted to rectify injustices in the law and to develop new concrete concepts of how social justice and legal justice can be reduced to practice. For this is an area in which students can and must get a feel for the philosophy of equity and justice, even though the modification which seems desirable should probably be brought about by legislation.

DISCUSSION FOLLOWING THE READING OF THE
PAPERS AT THE ROUND TABLE MEETING ON
JURISPRUDENCE—2:30 P.M.—WEST LOUNGE—
EDGEWATER BEACH HOTEL—SATURDAY,
DEC. 29, 1956, CHICAGO, ILLINOIS.

DISCUSSION LED BY DR. BRENDAN F. BROWN

(Professor Brown) Thank you very much, Dean Tinnelly.

(Brown) What were the seven values, Professor James, which you enumerated in your paper?

(Prof. James) They were the dignity of the individual; the physical well being of the individual; a wide freedom of speech, especially about matters that concern the public; the possession or receipt of property or money; the engaging

⁴ Madsen v. East Jordan Irrigation Co., as cited in the introductory statement.

in lawful activities for the production of goods or services, or entertainment; the continuing development of the arts and sciences to advance such production; and the satisfying of the prevailing community sense of justice or fairness.

(Brown) Professor Shuman, are you satisfied with this enumeration of values?

(Professor Samuel I. Shuman, from Harvard University Law School) I wonder why the enumeration of these values seems to offer some basis for what we call the Jurisprudential Analysis of Strict Liability. Indeed, as I read your paper and hear your remarks, it seems to me that you soon abandon these as criteria to which one should make an appeal, and that instead you talk of marginal utility, certainty, and calculability as the decisive criteria.

(Brown) Professor James, do you feel that you have been inconsistent in this respect?

(James) I don't think that all of the values come into all of the aspects of it. Certainly I don't think that freedom of speech is involved in accident cases. Now you mentioned—what were the specific things that you said—well, the marginal utility of money has to do with the psychological satisfaction of the individual about the receipt of the possession of money. It's an aspect of that.

(Brown) Do you agree, Professor Shuman?

(Shuman) Well, contrary to marginal utilities, economics would also be an aspect of that value, so that the appeal to marginal utility in no way exemplifies that principle as other than the fact that it could be included within it; but so could its contrary. So why appeal to the so-called value since it supports both what you assert and its contrary? The same would be true, for example, of the dignity of man.

(Brown) Professor James, I think perhaps it may be well if you will elucidate that statement in your paper to the effect that these values can be regarded merely as useful points of departure for analysis. What would be the implica-

tions of that? I think perhaps Professor Shuman may be attacking that point of view.

(James) I am not quite sure that I understand what Professor Shuman is saying.

(Brown) Are these really absolute values, or are they just tentative, convenient things to hang your hat on, as it were, in this discussion? Professor Shuman, is that your point of view?

(Shuman) Yes.

(James) Well, I think they were more the latter.

(Brown) Professor Parker, what is your position? Do you subscribe to the fact that these values are merely interests, feelings, just tentative things to proceed on, or do they have any real vital significance—these seven values?

(Professor Reginald Parker, from Willamette University Law School) I don't know. It strikes me that in the course of this discussion with all three papers, (although Professor Kalven has alluded to the problem), confusion has taken place — a very frequent confusion, however — between sanction and obligation. The legal order imposes sanctions for wrongs, and then it strikes us as unjust to impose a sanction on somebody who has not committed a wrong. But that does not prevent the legal order from imposing obligations or legal duties on other grounds than the commission of a wrong, such as to maintain one's children—that's not a sanction or punishment; for if you have children, that would be a very far-fetched view. Or, *respondeat superior*, a man is liable for the torts of his employee because he has the employee, although he is guilty of no negligence whatsoever. You can call it enterprise liability, to use the modern word. The *Sorenson* case, that's the broadcasting case, can be justified, it can be quite justifiably understood under that theory. Somebody runs a broadcasting station, and therefore he has to pay people who get injured thereby, regardless of his fault. It is an obligation he incurs.

(Brown) Professor Davitt?

(Rev. Thomas A. Davitt, S.J., from Marquette University Law School) I'd like to ask a question that ties in both with Professor Shuman's and Professor Parker's statements, and with Professor James' values. One of his principal values is the dignity of the individual. I am wondering whether or not in Professor James' mind that stands as a basis for responsibility. If it does, it seems to me that responsibility is essentially individual, and then we have the problem of justifying a shift of responsibility from the individual.

(Brown) Professor James, what is your precise meaning of the phrase, "the dignity of the individual"? Does it have variable content here?

(James) Yes, it certainly would. I was thinking of it narrowly, largely in connection with the problem of defamation, where the dignity of the individual is invaded that way. However, I can see an invasion of the dignity of the individual by allowing an uncompensated accident victim not to get care, cure, and rehabilitation, and having his family pauperized; and the preservation of that would be a worthwhile objective. Of course, there would be other things that would have to be balanced.

(Brown) Well, then, Professor James, in ultimate analysis, all of these values, then, do depend on the intrinsic worth and dignity of the individual in that sense, would you say?

(James) Yes, I would accept that.

(Brown) You are taking the dignity of the individual, then, rather in a subultimate sense?

(James) I was, that is, as I put it in the paper, yes.

(Brown) Now, Professor Kalven, what is your opinion as to the basic moral value underlying this doctrine of liability without fault?

(Professor Kalven) I think I'd come back to Professor Parker—that it is important that we keep in mind which aspect of strict liability we're talking about. If we go back

and talk about strict liability as an individual affair, I think there is no great moral justification for it, and frequently it falls before the superior equity of the negligence criterion and the notion that some personal responsibility must be involved before you will penalize a man for damages. If, however, you shift to—let me make the point this way—if you take what the English started to do when the Labor Government came in after the war, that is, you're not thinking about tort at all. You're thinking about the kinds of misfortunes people have: they get sick, they get unemployed, and so forth, and you start a widespread special insurance scheme. Suppose you were able to be a little more generous than the English were able to be with their awards, and you find out that, by inadvertence, you have made the traditional tort law superfluous. It seems to me that it is a forced reinterpretation to say that we must take head on the issue of whether personal responsibility makes sense or not.

(Brown) Professor Kalven, do you think the doctrine of liability without fault has any relation to the idea of social justice?

(Kalven) It — yes — in fact, I think that is probably fairly good theory for the modern case for it.

(Brown) Professor Shuman, what is your opinion of that?

(Shuman) Indeed, I would have thought that what Mr. James and others who advocate strict liability are doing is substituting some notion of social morality for the individual morality which was supposed to underlie tort liability before the further expansion of strict liability.

(Brown) Professor Cowan?

(Professor Thomas A. Cowan, from Rutgers University Law School) I was wondering what Professor James would say when he found that the dignity of the individual might conflict with the social welfare of injured parties; in other words, the dilemma of individual interests clashing with social interests. It did seem to me that whereas there was

lip service paid to the individual interests, the whole theory, as developed, was the development of the liability of groups.

(Brown) Professor Davitt, is that your view?

(Davitt) I want to shift back to something we were discussing with Professor Kalven.

(Brown) Very well, go ahead.

(Davitt) I want to ask Professor Kalven if we are in this situation. We have really a double standard in torts. We have a standard liability based on negligence, and we have a standard of strict liability based on risk bearing. If that's true, do you think it could be applied to crimes also?

(Brown) Are you asking the question, Professor Davitt, whether the doctrine of liability without fault is more justly applied to tort law than criminal law?

(Davitt) No. I'm asking, are we admitting there's a double standard of liability and, if so, why couldn't it apply reasonably to criminal law—a double standard of responsibility?

(Brown) What do you mean by a double standard, Professor Davitt?

(Davitt) Well, a man is liable if he is negligent; he is also liable if he is not negligent.

(Brown) Professor Kalven, is there a double standard, in other words?

(Kalven) Well, I think not in the interesting sense in which Father Davitt would be suggesting. That is, this seems to me to be a question I am not sure of the answer of. I would like to argue for the moment the position that personal fault is not really put in issue by contemporary notions of absolute liability. It is not so much that there is a double standard but that we look at the matter entirely differently. In a sense you are saying there is no great difference between

cancer and being hit by an automobile. And if that's the problem you decide to address yourself to, you've just gotten out of the torts field altogether.

(Brown) Professor Chroust, do you think there is any integrating principle which would integrate and give significance to these two ideas: negligence versus liability without fault?

(Professor Anton Hermann Chroust, from Notre Dame University Law School) I don't know. Frankly, I don't know.

(Brown) Do you think they're contradictory—inconsistent—or can they be integrated?

(Chroust) Well, I suppose there's always a certainty in law that we deal with problems among the paradox. You have a social interest. We live in a crowded society. However, we still carry on notions or carry with us notions which were developed in a less crowded society. That's a form of altruism. The idea of liability based on negligence may have applied to an individualistic society, while today, liability without fault may be in keeping with a kind of so-called social morality, if you want to call it social morality; namely, that society has an interest that none of its members should suffer an accident for which nobody can really be held responsible.

(Brown) Professor Shuman, do you find any principle of integration for these two concepts: negligence versus liability without fault?

(Shuman) The only integration I can recognize is that social utility expects to be achieved by using either principle to further achieve some more basic "value", to use Professor James' language, which is why I wonder what he means by "value" in these contexts.

(Brown) Professor Parker?

(Parker) I think I can go back—would like to go back to Father Davitt's remark about the double standard. I think it can be answered. Criminal law imposes sanctions, and it

would be immoral if criminal law would impose a sanction upon somebody whose fault it was not, who committed a crime only externally, but wasn't at fault for some reason or other. Civil law, on the other hand, imposes obligations, some of which are in pursuance of a breach of another obligation—and then they can be called sanctions. You didn't do as you ought to have done; hence, you pay damages. You breached your contract, and the law punished you. But it imposes on persons a variety of many other obligations which are not sanctions, and they should not constantly be confused. Strict liability might, if the situation so warrants, well be classified as a civil law obligation, but not as a sanction—you are not punished for anything—but because you run an enterprise, because you are somebody's boss, or because you are a citizen and have to pay taxes, and so forth. I think that's the best way of integrating the two.

(Brown) Professor Kalven, do you think the reasonable man might integrate these two concepts?

(Kalven) I'd like to say to that, Dr. Brown, that I think rather than the question of being one of integrating them, we ought to find some tension between them. I think the more interesting question is whether they require integration. In terms of what we have said so far, it seems to me they do not. Not that I confess that I am utterly confident of that answer—nor if I may just say one additional thing—I don't mean to dispose of, by my way of putting this, the real policy issues that are left over if you decide that you are going in for some scheme of socializing losses—that is, you still have the problem of deciding who's going to pay for it. And with all deference to Professor Parker's distinction, which I like, it may turn out that in the end the obligation is a trick name for a sanction.

(Parker) Yes.

(Brown) Dean Tinnelly, do you think that the reasonable man might be an integrating principle here, or do you have some other integrating principle?

(Dean Tinnelly) Well, it would seem to me that in liability because of fault we have just one of a series of reasons

for which we would impose an obligation which would be either a result of the power—an exercise of the power—of the state to enforce an obligation that was due from commutative justice or from legal justice. And it is this new term of social justice, which seems to be the development of legal justice, that is involved in this. It seems to me that we don't have to integrate, but that we do have to find some reason other than ability to pay in order to impose an obligation.

(Brown) Dean Tinnelly, would you find the integrating principle in the objective natural law?

(Dean Tinnelly) Well, yes and no. Yes to the extent that the natural law guides the civil law. Yes, to the extent that it is the obligation of the legislature or the government to take care of anyone that is injured who is otherwise unable to take care of himself. In other words, if in the form of compulsory automobile insurance or taxation, or a form of charity or welfare, it seems to me that either would satisfy the demands of the natural law.

(Brown) Professor Shuman?

(Shuman) It seems to me that the field of natural law in no way helps us in attempting to justify strict liability. For, as I think Dean Tinnelly accurately pointed out, natural law is not particularly concerned with what have been normally called "instrumental value judgments," but perhaps with inherent or intrinsic value judgments. And that's why I say that there must be some basis for the integration of these two principles as regards the philosophic question involved in tort liability.

(Brown) Dean Tinnelly, do we have to relate this problem of liability without fault to the natural law?

(Tinnelly) We do to the extent that we couldn't violate a positive principle of the natural law. For instance, if the only reason why I should be held liable is because I have enough money to pay the judgment, that certainly would not be sufficient.

(Brown) Professor Cowan, what is your response to this?

(Cowan) I would like to ask Dean Tinnelly what is the difference between a natural law and a Restatement of Torts version?

(Brown) Dean Tinnelly?

(Laughter from Dean Tinnelly) I'm certainly glad that I said I was not a torts expert. If you will tell me what the—

(Brown) Professor Kalven, can you give us any idea as to the content of that Restatement, of that section?

(Kalven) Resta—beg pardon?

(Brown) Will you give us the—

(Cowan) Section 592.⁵

(Brown) Professor Cowan, do you have any—?

(Cowan) As I heard Father Tinnelly's discussion of what the Natural Law would and would not approve of, it seemed to me to coincide pretty well with the ordinary view of the case laws in this country. I'm wondering if we're all practicing natural law by ear.

(Brown) Professor Davitt, do you want to address yourself to—

(Davitt) I think that with a few exceptions, as for instance, the *Sorenson* case, the Restatement would coincide with the principles of the natural law. But I would say that the Restatement does not codify the natural law.

(Brown) Professor Davitt?

(Davitt) Along the same line, I was wondering if Dean Tinnelly would say whether or not he thinks, according to

⁵ RESTATEMENT, TORTS § 592 Husband And Wife—A husband or a wife is absolutely privileged to publish to the other spouse false and defamatory matter of a third person.

his standards of natural law, that shifting the loss according to risk-bearing ability is one of the precepts of the natural law.

(Brown) Dean Tinnelly?

(Tinnelly) I would say that is one of the areas in which the civil law might well intervene—that that might be something that the natural law would leave to the civil law either to determine or to make more concrete in evidence.

(Brown) Professor James, do you want to address yourself to this particular point?

(James) Yes. I just wanted to say that it seems to me that in the case—kinds of cases—I was talking about it wasn't so much a matter of shifting the loss as a matter of widely distributing the loss after its being shifted among the beneficiaries of the enterprise that created the hazards that caused the loss, and that certainly I take it from what Father Tinnelly has said that there'd be nothing inconsistent between that and the natural law.

(Brown) Professor Chroust?

(Chroust) I would like to ask Professor James a question. In his comment on a case, *Donoghue v. Stevenson*, an English case, Professor Winfield, in his treatise—text—on torts, advised the plaintiff—you know the facts of the case—?

(James) Yes.

(Brown) Professor Chroust, perhaps you ought to state the facts, first, for the benefit of those who are present.

(Chroust) Well, a lady buys from a retailer a bottle of ginger beer—it's an English case—and finds a snail inside it—in the bottle—which caused her great discomfort, and—that's about all—these are the facts. But Professor Winfield advised the plaintiff not to sue the retailer but the manufacturer for the simple reason that she is more likely to recover and recover more from the manufacturer. I ask the question: Is that shifting because of distribution, or

shifting because of the greater ability to pay more substantially?

(Brown) Professor James?

(James) Well, let's not confuse two things. One is the tactical consideration for the plaintiff's lawyer. Now, of course the plaintiff's lawyer is going to advise suit at the point where there's the greatest ability to pay, and where the jury is likely to give the greatest damages. I wasn't thinking of the tactical point of view, but of the kinds of considerations that ought to persuade either the legislature or the courts through a common law process to administer the law; and there, it doesn't seem to me that the individual ability to pay is the primary consideration. It's a question of a broad social distribution of the risks; and the first point, the first incidence of liability, is relatively insignificant as long as it's a good conduit, and as long as it's fair to ask that person to pay a part in the distribution of the risks.

(Brown) Professor Chroust, do you want to push it further?

(Chroust) I'll try to get back to that case because Professor Winfield was not representing the plaintiff, and he merely made a scholarly comment in his book; so, therefore, this was not a tactical advice but a—it seems to be a jurisprudential advice, if you want to use that term.

(James) Well, perhaps I don't remember what Winfield said. I misunderstood then what you said. I thought that you were quoting Winfield as saying that this was what a plaintiff's lawyer should do.

(Brown) Is this a matter of social justice, natural law, something else?

(James) To me it's a matter of social utility, but I don't think it's inconsistent with natural law.

(Brown) Professor Kalven, do you want to come in on this?

(Kalven) Let me pick up a little that Professor Chroust said before and perhaps add a little something to this last exchange between Mr. James and Mr. Shuman. It seems to me that the real use of the ability—to pay—principle here is not in the *ad hoc* fashion that you drag a rich man in off the street and make him pay because he is wealthier, but in some deliberate advance use of it; it is almost a legislative principle. And that in fact the—the question I think, really is whether the legal system ought to concern itself with creating in advance an ability to pay for accidents. That might involve no rich people but simply wide use of the principle of insurance. Now let me say one more thing. The principle here may turn out to be different from the kind of thing we've been talking about. That is, it might turn out to be one principle of compulsory thrift. The state might get so concerned with the improvidence of people that may suffer accidents in society that it decides that it is better to force them to save in advance so that when the accident does come they're ready for it, via the insurance fund.

(Brown) Professor Parker?

(Parker) I just want to make one comment on this accident business. Why is it not equally possible to leave the risk where it is—in other words, with the victim who was hurt by a driver who was not at fault—and have him have accident insurance? Why does everybody always talk of the driver who is quite capable of buying liability insurance and can shift the risk? Why can't the victim shift the risk to his accident insurance?

(Kalven) I think that's the right question. I think the genuine questions of policy that are raised here are not in opposition to fault notions, but in terms of the possible ways in which you might decide to distribute, in a sense, the insurance costs among the—along various possible lines. And that is the genuine issue then that we might talk to.

(Brown) Professor Davitt?

(Davitt) Well, I was only going to point up that very fact—that insurance is not the main question here. There

is no problem in regard to either the plaintiff's or defendant's having insurance. The main problem that we have to discuss is, granting no insurance, could you shift liability to someone who is a better risk-bearer?

(Brown) Professor Kalven?

(Kalven) I think the question really is, Father Davitt, whether the state should permit that to arise. Isn't the question rather whether the state should exploit the insurance principle in advance so as to eliminate the situation which otherwise would be a sharp moral dilemma?

(Brown) Professor Davitt?

(Davitt) All I wanted to say is it seems to me that the insurance idea is a peripheral thing. There is nothing wrong with insurance one way or the other.

(Brown) Professor Kalven?

(Kalven) Well, it's not so much that there's nothing wrong with it— isn't it—mightn't there be something very good about it that makes it legitimate to me—I'm not sure about this but at least the argument would go this way—that it isn't that we object to the existence of insurance, or are ignoring it when it happens to occur, but whether the state couldn't exploit the fact that insurance happens to exist—it's in a sense a brilliantly useful institution—and decide that it becomes now one of the real policy obligations of the state to see that the insurance principle is properly exploited.

(Davitt) Well, I would agree with you on that.

(Brown) Professor James, do you believe that the case of *Vincent v. Stinehour*, Vermont, 1835, that horse and buggy case, was justly decided on the basis of negligence, or should it have been decided on the basis of liability without fault?

(James) No, I think that it was justly decided on the basis of negligence because it—in those days, there was no machinery for effecting a distribution of this loss among

the users of horses and buggies. If anybody had to pay in that case, it would be Stinehour himself out of his own pocket. Now that does pose an entirely different problem, but I agree entirely with what Professor Kalven has said; that the question now is whether we ought not to try to fashion our system so it effects a broad distribution of this risk—this loss—among the beneficiaries of the enterprises that cause it.

(Brown) Would anybody believe that the *Stinehour* case should have been decided on the basis of liability without fault? Professor Cowan?

(Cowan) I'm sorry. I didn't follow that question.

(Brown) In other words, in the *Stinehour* case, could you argue that the horse was a dangerous creature, that there was liability without fault, therefore, as I think counsel for the plaintiff did argue?

(Cowan) I don't know. I suppose the Indians regarded the horse as a dangerous instrumentality at one time. I don't know that I have very much to offer this audience by attempting to exercise my imagination in trying to envisage how that case could be an instance of liability without fault, but I do have a question that I should like to have answered that I did raise before, and that is this: what would Professor James do when there is a conflict between the value of individual dignity on one hand, and the social desirability of repairing reparable harms on the other. For example, it used to be thought beneath human dignity to sue for an injury unless it fell within one of the very narrow areas of tort liability. Indeed, we find that a great deal of the opposition to Workmen's Compensation and the vast spread of group responsibility are because they put an end to human dignity.

(Brown) Professor James, we're back again on this balancing of the interests or equities, as it were. In other words, would the feelings of social justice, or the feelings of fairness in the community have to yield if they went against what we thought was the intrinsic dignity of the individual?

(James) Well, I suppose in one sense of course not. I suppose that the executed criminal has his dignity offended;

and certainly in my own conclusion that, in agreement with Father Tinnelly, that *Sorenson v. Wood* was wrongly decided, I am elevating the social interest in freedom of speech over the indignity of Sorenson, who was offended by the libel.

(Brown) Do we all agree that the criminal does have his intrinsic dignity violated by capital punishment? Do we all agree with that?

(Shuman) No!

(Brown) Professor Shuman, will you take issue, please?

(Shuman) I just don't understand why Mr. James would say the dignity of the criminal is violated, unless by dignity he's now translating dignity into some kind of subjective evaluation, a situation from the individual and not from social evaluation, which seems to me to underlie all the other values which you posited on the first page of your analysis.

(Brown) Professor James, is this a weasel word, this "dignity"? Would you amplify it, please?

(James) I don't understand what you're talking about. As far as I can see, in any sense that is real to me (and I don't speak in philosophical terms), the family of the man that is executed for murder suffers the greatest indignity. Now maybe it's just that they should, but if they don't suffer indignity, I don't know what it is.

(Brown) Professor Cowan?

(Cowan) I don't know whether this is in order or not, but I wonder if I could put Professor Kalven on the spot for a moment.

(Brown) Well, couldn't we answer the question of this "dignity" before we go on to that?

(Cowan) All right.

(Brown) Does anybody want to address themselves further? Dean Tinnelly?

(Tinnelly) I doubt if we could agree on a definition of the dignity of man.

(Brown) Do we all agree that we cannot agree on the dignity of man? (Laughter).

(Shuman) No!

(Brown) Professor Shuman, will you proceed?

(Shuman) If you take this position and reduce philosophic questions to questions of definition, it seems to me you are not only throwing the baby out into the water; you're shooting the baby's mother and father as well.

(Kalven) That's an indignity, finally, isn't it?

(Brown) Professor Shuman?

(Shuman) That is an indignity of philosophy. I would suggest that there is a basis for understanding what Mr. James means when he speaks about dignity, and his reply to my question suggested that by dignity he now did mean some sense of individual feeling in response to perhaps a socially justified course of conduct.

(Brown) Does a criminal who commits a very serious crime withdraw himself, as it were, from the order of rationality?

(Shuman) I would suppose some criminals surely do, and in most criminal cases we treat them differently.

(Brown) And then the idea of the intrinsic dignity is ignored because of withdrawal from the order of rationality, is that true?

(Shuman) I would suppose rationality would be a condition for dignity of the human being.

(Brown) Then we could understand it on that basis?

(Shuman) If you don't understand it on that basis, I'd like you to tell what the dignity of a dog is.

(Brown) Does anybody want to tell us what the dignity of a dog is. (Laughter).

(Tinnelly) I would say he has no dignity at all in the same sense that a man does.

(Brown) What's the difference, Father Tinnelly?

(Tinnelly) I'd say that the dignity of man depends upon his essential difference from an animal, in the simple sense of the word. If he's a rational animal, he has an immortal soul, and he lives in a destiny beyond this world.

(Brown) Professor Davitt—do you want to come in on this?

(Davitt) I just wanted to ask one question of Professor James before Professor Cowan discusses what he wants to with Professor Kalven. To get back to the *Stinehour* case, did I understand you correctly to say that you thought it was properly decided on the basis of negligence?

(Brown) Professor James?

(James) Yes.

(Brown) Professor Davitt?

(Davitt) But that you thought if the structure of insurance was then available perhaps it should have been decided otherwise on the basis of strict liability?

(Brown) Professor James?

(James) Yes, that's right.

(Brown) Professor Davitt?

(Davitt) In other words, the basis for these decisions, then is the availability of, let's say, money and material resources to pay the loss, and not responsibility, ultimately.

(Brown) Professor James?

(James) Yes, what I say is—what—my position is that I feel this kind of loss ought to be broadly distributed over the beneficiaries of the activity that causes the loss, and that the law ought to guide it toward that direction and put pressure on the use of such devices as insurance.

(Brown) Professor Davitt?

(Davitt) Well, what I'm getting at, though, is something slightly more basic, and that is whether or not in torts we are going to take, as the basis of liability, blameworthiness, even though insurance is available, or not take it if insurance is available. You seem to say that if insurance is . . .

(James) Available.

(Davitt)—available, then blameworthiness should not be a deciding factor.

(Brown) Professor James?

(James) No, I don't take the position that the mere availability of insurance ought to be determining. What I—the kind of situation in which it seems to me that it ought to be determining is where you have accidental loss caused by conduct that is not on the whole morally blameworthy, and which is a more or less inevitable consequence of the activity of this enterprise. That kind of a situation.

(Brown) Professor James, if the case of *Vincent v. Stinehour*, that is the horse and buggy case, had been decided on the doctrine of liability without fault, would that have been unjust in your opinion?

(James) Yes, it would.

(Brown) Do we all agree that it would have been unjust?

(James) That is, given the then context.

(Brown) Professor Parker?

(Parker) If that is so, then why do we not agree that the other case, the *Vincent* case of Minnesota, 1910, where the master of a vessel was held liable in a case where a dock was destroyed without the master's fault and the court said the master was liable because after all it was his ship that was saved, and so on and so forth. Why do you also call that decision just? I mean, how do you harmonize them?

(Brown) Can you distinguish the two—the *Minnesota steamship case* and the *horse and buggy case*?

(James) Well, I distinguish them for this reason—that in the *steamship case* the owner of the steamship deliberately appropriated the property of somebody else to save his own greater property; whereas in *Vincent v. Stinehour*, there was no such situation at all.

(Brown) Professor Parker?

(Parker) Yes. I think that is a very satisfactory answer. I can, as a matter of trade secret, produce a one-sentence section of the Austrian Civil Code that solves the problem exactly as Mr. James and as the Minnesota Court proposed. It's section 1306(a) where it says, "If somebody causes a damage in order to avert an imminent danger from himself or another person, the judge must rule whether and to what extent damages may be recovered."

(Brown) Professor Kalven, do you want to come in on this?

(Kalven) No, except I think Professor James has already stated it—it seems to me a case really of unjust enrichment.

(Parker) It comes to that.

(James) That's right.

(Brown) Professor Chroust?

(Chroust) I would like to ask Professor James a question in the form of a hypothetical case that sets up the facts.

A group of enthusiastic citizens, being much concerned with the sale of pornographic literature, goes to the only drug store in a small community and says, "Unless you discontinue selling this line of publications, we will no longer buy our drugs from you." The owner says, "I'm awfully sorry. I have a two-year contract to be an outlet for this particular publication." So this group decides no longer to purchase its daily needs from the drug store and buys them in the next community, ten miles away. As a result, the drug store goes to the dogs. Now who pays for the drug store?—the well meaning citizens who put him out of business?

(James) Well, it seems to me that's a quite different thing from the *Vincent* case because certainly those well-meaning citizens there don't get or save their own property out of which to make the payment here. They're doing it for some moral reasons. I wouldn't—The doctrines that I was espousing here wouldn't lead to liability in that case.

(Chroust) But couldn't you say that they're saving also good, namely, morality among their children, certain moral concepts which society has accepted? I think that point seven of your values may be accepted, namely, the moral standards of society. It is felt that this line of publication is seriously threatening the morals of juveniles, so they take steps—perhaps these are strong steps and, as a result, the man has to close down his store. Now who is going to reimburse him for the loss?

(Brown) Professor James?

(James) Well, I think that the values they are trying to save there justify their conduct. I have no difficulty in seeing that. I don't, though, see any basis of liability. It seems to me that when material damage like this is concerned, the notions I have would involve unjust enrichment only where the defendant—the one who is sued—gets enriched in the kind of coin of the realm out of which he has to pay damages.

(Brown) Professor Shuman?

(Shuman) Then you'd only limit it to cases where the defendant makes money, because if he doesn't make money, he's not getting enriched in the coin of the realm.

(Brown) Professor James?

(James) Yes, this principle I would accept. Let me say this: it isn't only where he makes money; it's where—it would include a case like *Vincent*—where he preserves money—either preserves or makes. That's right.

(Shuman) Well, then you are looking at the pocketbook of your victims—of the defendants, rather. Yet you wouldn't do that for individuals. Why is it good to do it for classes of individuals, but not for individuals?

(James) Because it's the class that pays.

(Shuman) Is that always true of a particular defendant in an industry where he's the sole producer, or are we talking about classes of individuals, or of one individual's being a class?

(James) Well, where a single producer in an industry pays for the casualties of that enterprise—presumably he then distributes that cost among the beneficiaries of the enterprise, his customers and what not—that's quite the right thing, that those men should pay for the casualties—for the cost in human casualties that this enterprise necessarily causes.

(Brown) Professor Shuman?

(Shuman) If you're willing to look into the pocket of the defendant, then why don't we also look into the pocket of the plaintiff?

(Brown) Professor James?

(James) I would on the whole. But the point is that, in this classic case, the accident case, what studies there are show that the pocketbook of the plaintiff is mighty slim—is typically slim.

(Brown) Professor Shuman, are you relating the pocketbook to justice or something like that?

(Shuman) Well, yes, I'm trying to suggest that I'm not sure how Professor James justifies excursions into one pocketbook as the basis for liability.

(Brown) Professor Davitt?

(Davitt) I was wondering if Professor James would agree that the pocketbook has a relation to the dignity of the individual. (Laughter)

(Brown) Professor James?

(James) It certainly would in the way I was talking.

(Brown) Professor Kalven?

(Kalven) I'd like to ask Professor James a question. Isn't it true that frequently it's the same pocketbook in the end?

(James) Well, of course it is.

(Brown) What pocketbook is it?

(James) Well, it is often the plaintiff's pocketbook—that is, the plaintiff's pocketbook as one of a great group of which he is a member.

(Brown) It's always the plaintiff's pocketbook, you say?

(James) No, I didn't say "always," by any means. I said it often could be.

(Brown) Professor Shuman?

(Shuman) In which event, doesn't this position reduce itself to a kind of absurdity unless you're prepared to go to the full extreme of your principle and say, therefore, that government insurance should be paid for all accidental injuries.

(James) As a matter of fact, I think a great deal could be said for that, if you call that an absurd conclusion. I think there are some countervailing things that make me doubt that. But I think that's a perfectly tenable position.

(Shuman) It is tenable, and I would say it's absurd only because of the implications which it carries. It then seems you're arguing an extreme kind of socialism for all kinds of accidental injury.

(James) Well, perhaps it's because it's so extreme in that form; but the fact that in its extreme form it's bad doesn't mean that a good deal of the kind of thing is good. For instance, what you were saying was said about Workmen's Compensation—that this was socialism. And I think on the whole most people accept the justice of Workmen's Compensation today.

(Brown) Dean Tinnelly do you think that the *Luthringer v. Moore* case, the California pest eradication case, was justly decided on the basis of the doctrine of liability without fault?—the extra-hazardous situation?

(Tinnelly) Except that while the conduct in that case might be said to be controlled by the doctrine of liability without fault, actually it was the undertaking of an ultra-hazardous occupation, and therefore constituted what we might call legal, rather than moral, fault.

(Brown) Do you think it was justly decided?

(Tinnelly) I think it was justly decided.

(Brown) Do we all agree it was justly decided?

(Kalven) Not me.

(Brown) Professor Kalven disagrees. Professor Kalven, do you disagree?

(Kalven) I disagree for the reasons previously stated—that is, I think that if you're operating here in very specific pockets, you're going to distinguish this kind of liability

from some other kind; that there's nothing to show that the particular kind of extermination was any more dangerous than anything else; the criteria itself doesn't mean much to me to begin with; and finally, I don't quite see just because the activity was a little more dangerous, if you agree that it was carried out as carefully as could be expected for that kind of activity, why it should be held liable.

(Brown) Dean Tinnelly?

(Tinnelly) I think I might agree to this extent, that I think it would have been much wiser if this could have been anticipated and done by legislation rather than by a court or by causing a defendant's loss without his realizing what he was getting into.

(Brown) Professor Kalven?

(Kalven) I think my objection might go deeper than that. I don't know what the legislature would decide either. I don't see any basis—they're using this criterion as the—some special hunch about the incidence of danger in different activities. I don't see any basis to think that it's any more intelligible to a legislature than it would be to a court. It might not even be intelligible to a jury, I might add.

(Brown) Dean Tinnelly?

(Tinnelly) I would agree that this might be another area in which it is realized that no matter how careful you are, there are going to be a certain, perhaps mathematically calculable, number of accidents; and, therefore, it might be another area in which we might have a form of insurance, or a cost of doing business.

(Brown) Professor Kalven, are you concerned with the difficulty of finding criteria for determining what is ultra-hazardous?

(Kalven) That's right. It's in a sense a technical difficulty in terms of the general scope of this discussion, and it goes primarily to the last remark Father Tinnelly made;

that is, I think all activity is ultra-hazardous, in the sense in which the exterminating might be ultra-hazardous.

(Brown) Well, this factor of the ultra-hazardous, is that a scientific, physical, determinable thing, or is that a moral, jurisprudential matter?

(Kalven) Well, I think that it's a basically physical matter that depends upon some notion of frequency and a statistical idea that seems to me utterly impractical, and, say, almost meaningless.

(Brown) Professor Shuman?

(Shuman) Professor James before referred to this question also. I wonder why, with you, Professor James, that because of its statistical probability to certain incidence of injury that, therefore, justified the imposition of strict liability.

(Brown) Professor James?

(James) Well—because this, it seems to me, equates the enterprise that incurs this certain risk to the defendant in the *Vincent v. Lake Erie Transportation Company* case. When, for instance, I undertake to run a railroad for a year or two years, I know as a certain matter that it's going to take at least a certain toll in life and limb. When I decide to do that for my profit and others, in the face of that statistical certainty, I am thereby enriching myself at their expense; and the principle of unjust enrichment comes in.

(Brown) Professor James, do you think that a driver of an automobile at the present time is morally blameworthy on the objective level because of his knowledge of the statistical certainty of many resulting injuries to person and property?

(James) No. As to a given driver, certainly that doesn't hold. But when the drivers combine their risks together in insurance, then you can treat the drivers as a group, just as you treat the railroad as a whole enterprise.

(Brown) You mean the whole is greater than its parts?
(Laughter)

(James) I don't know if it's greater than its parts or not, but the whole group is the one that's paying, and the whole group knows or ought to know that there's going to be this toll.

(Brown) Professor Shuman?

(Shuman) Well then, in that event, it would seem that compulsory insurance would be morally improper because you should require insurance according to groups: Real good drivers—good rates; real bad drivers, very bad rates.

(James) I agree that this ought to be done, but this has nothing to do with whether you ought to have compulsory insurance, Professor Shuman. I think (a) you ought to have compulsory insurance; and, (b) that it would be a very good thing if you had a selection of risks along the lines that you suggest.

(Brown) Professor Davitt, in view of this statistical certainty, do you think the drivers of automobiles are deliberately causing injuries today?

(Davitt) Well, I don't imagine anyone is deliberately causing injuries, especially to himself. However—

(Brown) Well, they know that somebody's going to be killed. Do you agree?

(Davitt) I somewhat wonder at two things that Professor James said: that most of these accidents were blameless, I believe you said?

(James) Yes, I said that a great many—a—yes, a great many of them are.

(Brown) Do you mean they're non-negligent?

(James) As far as—a—yes—as far as any moral blameworthiness is concerned. No, a lot of them involve negligence,

but that's because negligence takes an amoral objective standard and doesn't take into account things like accident proneness. And the more we have made scientific studies into the conduct that causes accidents, the more we find that if we judge these men according to a subjective standard—that is, taking into account their own abilities—that they would be blameless.

(Brown) Professor James, do you think that negligence is not necessarily a moral matter?

(James) I'm saying—a—yes—I'm saying that legal negligence is not necessarily a moral matter, that it doesn't correspond to it. That a man is held to the conduct of a reasonably prudent man, whether he can meet that conduct or not.

(Brown) And what is legal negligence?

(James) Legal negligence is falling below that objective external standard.

(Brown) Professor Shuman?

(Shuman) There are two points I'd like to make, Mr. James. First, that there's an important distinction which need be drawn between an intentional act and a deliberate act. And I think what you're saying, since all these injuries are intentional but not deliberate, you don't deliberate about running into somebody, but you intentionally drive a car, and because of the statistical probability, the injury is intentional.

(Brown) Professor Shuman, you mean, in other words, you set up deliberately the situation from which this results. Is that it?

(Shuman) No, you intentionally participate, but you don't deliberately injure. Professor James is saying you are punished because you indulge in the intentional activity.

(James) I agree that there is a distinction. But the distinction I would draw is this: Intentionally doing an act

is when you recognize the moral certainty that that act will cause harm. Now, after all, when Vincent tied his boat up to the dock, he didn't want to injure that dock. He didn't deliberately injure the dock in that sense. But he deliberately did an act from which injury to the dock was a foreseen and inevitable result.

(Shuman) He intentionally did an act.

(James) That's right.

(Shuman) He may or may not have deliberated about the possible consequences. If a man pushes his wife over the cliff on an impulse, that is an intentional act, but I don't know if you'd call it deliberate, unless he planned it two weeks before—or a day.

(James) Well, I don't know that deliberate adds anything to this, but he intentionally does an act when the—when it will knowingly cause harm—when he must realize that it will cause harm.

(Brown) Professor Chroust, do you believe that the case of *Sorenson v. Wood*, the Nebraska defamation case, was justly decided on the basis of liability without fault?

(Chroust) That's a huge order, I should say.

(Brown) I think Professor Kalven could give a ready answer to that. Professor Kalven, you'd say—?

(Kalven) I'd say it's no more unjustly decided than any other defamation case.

(Brown) But they're all unjustly decided?

(Kalven) Well, I'm not sure. I think I'd say "yes" to that.

(Brown) Very well. So we have a clear answer there. Professor Chroust, do you agree?

(Chroust) Yes, I think I'm inclined to agree with Professor Kalven.

(Brown) Do you all agree that this Nebraska defamation case was unjustly decided? Does anybody think that it was justly decided?

(Parker) Yes.

(Brown) Professor Parker, you do? Will you proceed to defend your position?

(Parker) Yes, it was justly decided if we get away from the traditional concepts of liability. It was as justly decided as any liability without fault case. Somebody runs a broadcasting station and is liable for incidents that occur from that station. I am liable to pay taxes. Has anybody ever tried to justify that on the moral grounds of negligence? No, and there are many other obligations of that kind, and it may be perchance that you can resolve the existence of a broadcasting station into a legal relation which obligates that the broadcasting station should pay for injuries.

(Brown) Professor Parker, would it be just to compel the owners of broadcasting stations to carry liability insurance in order to compensate those who are defamed?

(Parker) Well, a—I don't know how financially strong broadcasting stations are. Maybe they don't need it. They can pay it out of their own pockets. I mean—I wouldn't say—no, I don't think it would be just.

(Brown) Professor James?

(Parker) That's their business, whether they are rich or not.

(Brown) (To James) Do you want to address yourself to this?

(James) Two points: First, a lot of broadcasting stations are fairly little—do business on a very little basis. And

the second thing—a—point I want to make is this: that I agree that there is some similarity to enterprise liability . . .

(Parker) Yes.

(James) . . . In the *Sorenson* case, the reason that I would decide it differently is for a different reason, and that is, that the cost of doing it to society is too great. If we impose strict liability on industry or on—a—on motoring, we're not going to prevent people from motoring, and we're not going to prevent people from industrial activity. If we impose strict liability on radio stations, we're not going to make them stop running radio stations either, but we are going to make them very, very strict about allowing broadcasts of public issues. In other words, we're going to make them strict censors. And that, to my way of thinking, is much too high a cost to pay for the kind of enterprise liability that I would like to see in other fields.

(Brown) Professor Kalven?

(Kalven) I think that I agree with that. I'd like to come back to Professor Parker for a moment. It seems to me that his last excursion tends to make the distinction between obligation and sanction a little too tricky. That is, it—if we went back to the horse and buggy case, I suppose we could say if we held the driver liable there, regardless of fault, we'd just impose an obligation on him instead of a sanction, and that takes care of that. That seems to me then to really obliterate a possible real question that otherwise could arise.

(Parker) Yes. We could have done that. I mean that's why Professor Brown posited the question whether or not the horse and buggy case could have been decided on the grounds of running a dangerous enterprise, such as a horse. In other words, we didn't, and especially since the case was decided in 1822, I didn't say that one has to decide this or that way. I only meant to say that it is morally justifiable if a majority of citizens so agree.

(Brown) Professor Shuman?

(Shuman) May I ask a question of Professor James?

(Brown) Sure.

(Shuman) Again, you are arguing, if I understand you correctly, you were arguing before about negligence being not morally blameworthy for, among other reasons, because of the accident proneness of some individuals; this is therefore some kind of character trait, and to say that this is morally bad stretches the concept of morally bad. But doesn't this amount to saying that if you do a wrong thing often enough, it ceases to be wrong?

(Brown) Professor James?

(James) I don't think it does. If you want to—of course, if I got blind because I went on a bat one Saturday night and got into a fight and went blind, does that mean that I am morally wrong later on when I can't see the train coming? I wouldn't think so.

(Brown) Professor Shuman?

(Shuman) I don't quite see the connections with that situation and accident proneness.

(James) Well, accident proneness is, very often, is simply a physical thing, but it may also be a character defect. Now the character defect, the kind of thing that leads to compulsive behavior may have come from past below-standard conduct.

(Shuman) But isn't this carrying determinism to a really greater extent than you have determined it in previous senses?

(James) I don't think it's carrying determinism nearly that far. It's simply recognizing that there are certain limits within which we all must act, and I suppose that we all admit that.

(Brown) Professor Shuman, go ahead.

(Shuman) Well, then you're saying that if a course of conduct is due to physical difficulties, which resulted from

an—this physical difficulty resulting from a morally wrong act, you excuse the morally wrong act, but don't excuse the consequences of injury which results from the physical impairment.

(James) Well, I don't know whether I'd say exactly that. But it seems to me that the moral wrongness of going out on Saturday night and getting into a fight is not the kind of thing that fairly can be said to have produced the consequence of failing to see a train ten years hence on the Chicago and Northwestern tracks.

(Shuman) Well, then only the things you can anticipate for your presently morally wrong acts are the ones you'll take into account?

(James) Well, I should suppose it would be something like that that would limit the consequences. I don't suppose that we're all irretrievably lost in all its aspects because of—we may have been conceived in sin, or something like that.

(Shuman) Well, we might as well put out a bigger diary if we're going to keep track of all our acts for those purposes.

(James) Well, I should think so. That's what I'm asking you not to do.

(Brown) Professor Kalven, do you think that the *Utah mink case* was decided justly—the mink killing her young because of the blasting?

(Kalven) I think that it was probably decided erroneously because of the lack of familiarity on the part of the court with the habits of mink. I think that the court regarded it as just spectacularly idiosyncratic that the mother should kill her children and apparently they would do that—I mean they're very nervous and would react that way all the time. On the other hand, I think the case has a point in it which is that at some point you want to cut off strict liability no matter what your initial premises are, and that seems to me an interesting doctrinal difficulty.

(Brown) Would anybody want to discuss the justice or injustice of the *mink case*? (Pause) Well, now we've been at this quite a long time, and I think we're in order—Professor Davitt, did you want to—?

(Davitt) I'd like to revert to the interchange between Professor Shuman and Professor James.

(Brown) Go ahead, go ahead.

(Davitt) I'm wondering about the implications of Professor James' position. If most of these accidents, let's say a traffic accident, are blameless, then I'd like to know what you think about two things: 1) what about the justification, then, of arrest and fine and imprisonment; and 2) what are the implications of this principle in criminal law?

(James) Well, you ask me a very difficult question. I suppose that one of the purposes of criminal law is to—is its deterrent effect not only on the individuals arrested, but on other people; and it's conceivable that although this man's slips would be forgiven in heaven, it may be necessary to make an example of him, but I certainly am not —

(Davitt) Well, let's keep it on a local court level here.

(James) Well, that was only a concession on my part.

(Davitt) Well, I don't believe we need that right now.

(James) All right, but I haven't thought through what ought to govern criminal justice. It seems to me that this is a thing that is very debatable. But I can understand, as a reasonable proposition, the fact that it may be necessary to punish people who've fallen below a certain standard of conduct even though they didn't have the intelligence to come up to it, in order to get its deterrent effect.

(Brown) Professor Cowan?

(Cowan) Professor James, haven't you really taken only two classes of torts and attempted to generalize on their basis? One, the automobile accident; and the second, enter-

prise liability; and although they may be criminals in the public eye, what about all the rest of the law of tort that hasn't anything to do with either of those two situations where the law itself may act as a strong deterrent, to follow Father Davitt's notion?

(James) Well, I certainly agree with you. I have taken only a few instances, and what I've tried to do is to show that I don't feel that a single one of those principles is uniformly applicable—that there are some situations that call for the application of what we might call strict liability, and there are some where negligence or fault is more appropriate.

(Brown) Professor Cowan?

(Cowan) In other words, why can't we simply take those few special classes of torts and—turn them over to administrative law and then go on from there.

(James) That would be exactly my position.

(Cowan) Then you would be faced with the problem of what to do about the great mass of the law of tort, which is extremely complex. Would you say that it should be governed by the principle of fault?

(Brown) Professor James?

(James) Yes, I'd leave a great deal of the law of tort to the principle of fault. My heavens, just think, I've just written a book. It'd be terrible to have it all become outdated. (Laughter)

(Brown) Professor Chroust, do you want to address yourself to this?

(Chroust) No, I want to return to the *Sorenson* case because there's something troubling me. That's why I said it was a big order, and I address Professor James.

(Brown) All right, proceed. Professor James is really bearing the brunt of the afternoon.

(Chroust) Yes, he's really on the firing line.

(Chroust) Now, in your value number one, you speak about the dignity of the individual; and in value number three, his freedom of speech, especially about matters that concern the public. It seems that you think that the *Sorenson* case was decided—shall we use the word “unjustly”—because it violates principle number three. But how about—what happened to principle number one.

(Brown) Professor James?

(James) Well, that's a perfectly fair question. I think that the Nebraska court felt that principle number one was more important than principle number three. It is simply my own value—judgment that, in that context, principle number three is more important than principle number one.

(Brown) Professor Chroust?

(Chroust) Now I think we're getting somewhere. In other words, the dominant values among these seven values which you enumerated are determined by their particular context. In other words, you don't give preference to one over the other except in a special or particular context.

(James) Yes, I'd say so.

(Chroust) That bothered me.

(Brown) Professor James, do you think you ought to throw in mental well-being, spiritual well-being, together with physical well-being or are those implied in—

(James) Oh, this is not—I don't begin to be exhaustive here; certainly I was primarily concerned here with the accident problem, and certainly there are many other values that are not listed here.

(Brown) Professor Kalven?

(Kalven) I'd just like to make a small additional comment to this last exchange. It seems to me that value number

one is also defended by not imposing liability in the *Sorenson* case on the grounds of—that free speech carries with it considerable implications for the dignity of the individual.

(James) Yes, that's true. And for many individuals.

(Brown) Professor Shuman?

(Shuman) May I take Professor James off the line for a minute and ask Dean Tinnelly a question? Dean, why do you feel so strongly that it's wrong to make—to determine who should pay merely on the basis of who has money?

(Brown) Dean Tinnelly, did you say that, first of all?

(Tinnelly) I think I did. I think it would go back to the problem of legal justice—that the state has the duty of enforcing those things which can only be handled by the civil government. Now, if there's a question of the defense of the nation, then we certainly may take the position that he who has money can be taxed severely. However, when you're imposing an obligation to make a restitution for a harm that has been committed, it seems to me that natural justice imposes an obligation on the government to distribute these burdens fairly, and that there would have to be something more than ability to pay as the basis of that distribution.

(Brown) All right. Now the discussion has been going on for one hour exactly, and I think it's time to throw this open to the audience. Those who wish to speak will please approach the platform and announce their names so that their questions or comments may be recorded. All right, are there any questions or comments from the floor?

(Brown) Professor Lucey?

(Rev. Francis E. Lucey, S.J. from Georgetown University Law Center) I'd like to ask Father Tinnelly a question. It seems that most of you are trying to avoid purely social utility or the deep-pocket theory as a rational basis for liability without fault. As a teacher of jurisprudence, that's a problem which plagued me for years— —how to fit it in

with the natural law system. Now actually, a thing is in accord with natural law if it's reasonable and fair and doesn't contradict that law on fundamental principles. My solution of this whole question, at least covering most of the types of cases that come up, as for instance, the *Chicago Tribune* case, or broadcasting companies case, is this—I got the idea actually from Holmes, and I'm trying to think of the case.

(Brown) *Peck v. Tribune Co.*?

(Lucey) No, no not *Peck*. The case came up from Arizona and regarded a state deposit insurance act before we had our Federal Deposit Insurance Act. Many of you will remember it. And the name of the case has escaped me, in which Holmes said, you have no natural right to be a banker; but if you want to be a banker, the state can lay down the conditions under which you can be a banker. Now I say the same thing with regard to employers, Workmen's Compensation Acts and all these other types of cases—in fact, with regard to an automobile owner. You have no absolute natural right to be a publisher of a paper or a manufacturer. In fact, you have a right to life and to gain the means of existence, but as to each specific type of activity, the state can say you cannot do that except under these conditions which are necessary for the common good of civil society, and Father Tinnelly, I was wondering if that would fit in with your explanation? — and Father Davitt might come in on this too. Would this not give us a rational explanation of the natural law view as to liability without fault where it's a question of who's going to take the loss between two innocent people. That's what it comes down to. There's no question of negligence and no intentional wrong done, and I'd satisfy myself that way and I'd like to—

(Brown) Dean Tinnelly, are you ready for the question?

(Tinnelly) I'd be in accord with that.

(Brown) Father Davitt, did you want to comment on this?

(Davitt) Well, yes.

(Brown) All right.

(Davitt) First, I would say I'd qualify Father Lucey's remarks a slight bit. Although a man doesn't have a right to be a publisher, or let's say a doctor, nevertheless, I still think there's a third thing between what the state can tell him to do and what he has to do. A man might not have a right to be a doctor, but he still may become a doctor. The second thing I would say would be this—with regard to strict liability: Father Lucey has spoken of how he, himself, justifies himself. I would justify it by assumed responsibility. It may come to the same thing; but I would not impose liability on a man because he has the money, but because he has assumed responsibility in engaging in this particular enterprise.

(Brown) Are there any questions or further comments from the floor? Will you announce your name?

(Professor Alfred W. Blumrosen, from Rutgers University School of Law) Several things have occurred to me during the course of this discussion; one of which is that there seems to be a slight inconsistency in the reluctance of Father Tinnelly, and I suggest of several others, to go to the deep-pocket theory and impose liability simply because one has money; and yet, I find little or no reluctance to create a situation where one will have money and then impose liability on some assumed responsibility notion. In other words, we won't say just pay because you have money, because it seems that that would impose an obligation on the rich, whereas in the same set of facts, a poor man might not be liable, and this, I suppose is what is inconsistent with this sense of fairness, or something like that; and yet, we are perfectly willing to put the poor man into a group, which is what Prof. James does, and then we have all kinds of rich people to treat, and this,—then we don't worry about the problem. You don't have any objections, do you, Father Tinnelly, to making this — ?

(Brown) Do you want to point the question directly to Father Tinnelly? Would you point the question—please repeat the question.

(Blumrosen) Surely, do you object, or do you find objection, to creating a situation where we avoid the problem of the poor man versus the rich man by putting the poor man in the position of having access to the money which could be used to compensate?

(Tinnelly) Well, first of all, on the deep-pocket theory, I would say this: I would be opposed to something which in the first case would impose liability on A, simply because he could afford to pay the judgment; whereas, in another case, B, who could not afford to pay judgment, would not be held liable. On the other hand, I think that when you come to the poor man who is injured, that we have a completely different concept than the pure aspect of justice. There we have also the concept of charity on the part of individuals to help to contribute. For instance, if a man were destitute—if there were no way in which he could be helped by the state, it would be incumbent upon his neighbors to help him, and possibly as a matter of conscience to help him, even though it was not in justice, but in the virtue of charity. However, the civil law has the obligation to step in under the doctrines of both legal justice and social justice to take care of him, because property, while it is a right, is not an absolute right, it's a restricted right, and must be used for the benefit of others, but only according to law.

(Brown) Are there any further questions or comments from the floor? Professor Shuman, did you want to make a comment?

(Shuman) I'd like to suggest with regard to Father Lucey's comment—I agree that there are no natural rights to engage in business, but then, on the other hand, if there are any such things as natural rights at all, I'm not just sure why there isn't a natural right to engage in the business of being a publisher.

(Brown) Father Lucey, did you want to defend this? Will you ask the question, Professor Shuman?

(Shuman) If there is such a thing as a natural right, why is there not a natural right to be a publisher?

(Brown) Father Lucey, is there a natural right to be a publisher?

(Lucey) I think that it would be the same—that a man has a natural right to engage in any type of work he desires, but he can't do that if it's harmful to civil society and to others. But the state also has rights through the natural law to regulate and effectively control its citizens in their actions toward the common good—the achievement of the common good. Now he has a right as long as he doesn't violate the rights of others. That would be my answer to it.

(Brown) Professor Shuman?

(Shuman) Well, this is rather different from saying there is no such thing as saying there is no natural right to be a publisher.

(Lucey) Well, what I'm saying is this: you have no absolute natural right to be a publisher. The natural law says you have a right to existence; you have a spiritual soul with certain faculties; you are a rational being; you have an end different from inanimate things or non-rational beings. Therefore, you have certain fundamental rights that come with your existence, and nobody else has a right to interfere with those fundamentals. You have a right, therefore, to use your capacities as far as you can, as long as the use doesn't interfere with like rights of others; and that's why I'd say a man has no right to own a broadcasting station or to be a publisher except under conditions which the state may reasonably impose upon him, so that he doesn't create a harm to others. And I will also agree with what Father Davitt said as to assumption of risk—I think that one can say it is reasonable to hold that he must assume the risk of damages for a loss which he cannot foresee.

(Brown) Father Lucey, would you say that the doctrine of liability without fault is more justly applied in the law of torts than in the criminal law?

(Lucey) I do not like it in criminal law. I'd rather have it called a public tort because when a man commits a crime, as in the cases we had during prohibition for the transportation of liquor and so on, a man is branded as a criminal, which is a stigma on him, in situations where he couldn't have avoided doing what he did. He couldn't possibly have foreseen. I don't like that. I think you could frankly call them public torts or something of that kind.

(Brown) Professor Cowan, do you want to take issue with Father Lucey on that?

(Cowan) No, not particularly with that special point, but I'd like to make a general comment.

(Brown) Does anybody want to take issue? Professor Cowan, you may proceed then.

(Cowan) It has to do with what Father Lucey especially said, and that is this: I gain the impression that in the Restatement of Torts, my old law professor, Frank Bohlen, and his associates seem to have been in the business of codifying the Natural Law. Now I understand that Bill Prosser and Wex Malone and Page Keeton are revising it. I think those rascals are out to revise the Natural Law!

(Brown) Do any of those professors want to defend themselves? (Laughter).

(Cowan) I'd like to make another comment if I may. That is, I don't want to rest on that point.

(Brown) Professor James, do you want to be the advocate here?

(James) I don't know. I understand that Father Tinnelly did not feel that the natural law put the Civil Law in a strait-jacket—that it allowed for latitude, for changes as conditions changed and so forth. Isn't that so?

(Cowan) I wonder if I could reply to that?

(Brown) Professor Cowan?

(Cowan) With deference to the various commentators here, I wonder if we aren't talking about the Natural Law in much too narrow and specific a fashion. I don't want to speak for them, but it seemed to me that the principles of the Natural Law have to do with some very enduring qualities of human nature, and that one runs into a great deal of difficulty in attempting to distinguish *Sorenson v. Wood* from the New Jersey case of the same general sort, where one court rather thinks that there should be liability and another thinks not, and that it has testimony that one is in accordance with Natural Law and that the other is not. I rather think that Natural Law as a philosophical principle does deal with the more enduring qualities of human nature, and I do think that here we have perhaps attempted to distinguish situations that the Natural Law would be, I might say, simply not concerned with.

(Brown) Dean Tinnelly, would you say that the Natural Law was more or less irrelevant to this discussion?

(Tinnelly) No. I wouldn't say it was irrelevant at all. But I think that there are—well, to answer that, I'd have to almost give a whole course in jurisprudence to the breakdown of areas preferable and extensive to the Natural Law. I would say that there is a violation in the *Sorenson* case of a principle which would ultimately rest upon the Natural Law, namely, that there was not sufficient notice given to someone, or rather that the broadcasting company was forced to bear the liability of the libel of the speaker despite the fact that it had absolutely no control either over whether he was going to say anything, or what he was going to say. So that I would say that the Natural Law is concerned, but again I'd say that it is not codified.

(Brown) Professor Davitt, do you want to address yourself to this problem?

(Davitt) Yes, I think I'm going to be more or less in agreement with Professor Cowan but, as we all agree, there's no more vague term floating around this room, and everywhere else, than this "Natural Law."

(Brown) You mean the term is vague?

(Davitt) Yes, the term is vague. I think if we'd ask every man in this room to write down what he means by it we'd get as many different answers. I think we ought to make this distinction. If Natural Law is "natural", it's something that has to be known naturally, and this means a judgment that a man makes naturally. I think that's one thing, and those are the basic things, I believe, Professor Cowan was talking about. Of the rest of the things that could pertain to it are those judgments a man doesn't make without reasoning. He makes them after some reasoning. That's a different area, and you can also say these judgments are according to the Natural Law. Of course, you have a foundation in the Natural Law for everything you discuss that's good or bad. But what we all judge, all of us, instinctively, that would be the Natural Law known without reasoning; and what we judge by a reasoning process, this is also Natural Law but not known instinctively. I do think we should think of the Natural Law in terms of this very radical and sharp distinction.

(Brown) Dean Tinnelly, do you think that the Natural Law is vague?

(Tinnelly) No, I don't think that the Natural Law is vague at all. I'm certainly sure that if we were to reconcile our verbal differences we'd have no difficulty at all.

(Brown) Well, Father Davitt?

(Davitt) I am pleased with this interpretation. To me, the judgments of basic Natural Law are clear as crystal. What is "vague" is the content of the judgments we afterward arrive at through reasoning and experience.

(Brown) You mean the application of it?

(Davitt) Yes.

(Brown) Professor Parker, do you—?

(Parker) Well, I just wanted to ask a brief question. How can the Natural Law be not "vague" in the face of so

many different opinions — different religions, different creeds, Communism, and so forth. There is no institution, practically, that hasn't been claimed as part and parcel of the Natural Law—such as slavery. It has persisted for 10,000 years of human history and has been maintained as a “natural” institution. I think, in other words, we don't want to bog down into a theological discussion. We can, nevertheless, rationalize the *Sorenson* case on positive law and say that it is a good case.

(Brown) I'm doing my best to close this discussion, but it's pretty hard. Father Davitt?

(Davitt) I agree completely with what Professor Parker said. That's precisely my point. If you don't get fundamental enough in the basic judgments, you have all sorts of diversities. I don't think that all of us naturally judge slavery as good or slavery as evil. We reason to one or the other judgment.

(Brown) Professor Davitt?

(Davitt) Regarding the proposition that slavery is good or bad—I don't think that we all naturally and instinctively reach the same judgment, as Professor Parker has properly said. But whether certain basic things like self preservation, living in society, living an intellectual and free life, sexual union to carry on the race are good or bad—I'm saying those are more basic things and concerning which we have unanimity of opinion. Past that, where reason and experience are necessary, it's a different story.

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